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No. 78-107

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD L. WHITNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A-1 to A-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. By order of Mr. Justice Blackmun of June 7, 1978, the date for filing a petition for a writ of certiorari was extended to and including July 22, 1978. The petition for a writ of certiorari was filed on July 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a prosecution for failure to file timely income tax returns, the district court abused its discretion by permitting the government to present evidence of petitioner's failure to file timely returns for years prior to the prosecution years.

2. Whether petitioner was the subject of selective prosecution or prejudiced by any preindictment delay.

STATEMENT

In September 1977, petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts of willful failure to file timely income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. After a jury trial, petitioner was convicted on both counts and was sentenced to a prison term of 90 days and fined $500. The court of appeals affirmed per curiam (Pet. 2, 3; Pet. App. A-1).

Prior to trial, petitioner moved to dismiss the indictment on the ground that his case had been improperly selected for prosecution. He also moved to inspect the Department of Justice file on his case. The district court denied both motions after an in camera inspection of the government's file (Pet. 2, 4; Pet. App. A-2).

The evidence shows that petitioner did not file income tax returns for 1971 and 1972 until February 1974, at which time he paid the taxes due for 1970, 1971, and 1972 (Pet. 2, 4; Pet. App. A-1).

At trial, Revenue Agent Robert Scanlon testified that he learned of petitioner's failure to file returns for 1971 and 1972 while investigating a collection matter involving 1969 and 1970 taxes. He testified further that, in December 1973, he received a taxpayer delinquency

investigation concerning petitioner's 1971 return, and then decided to refer the matter of the delinquent returns to the Intelligence Division for criminal investigation (Tr. 144-153). Scanlon further testified that his referral was not prompted by petitioner's failure to pay 1969 and 1970 taxes (Tr. 161).

During trial, the government presented evidence showing that petitioner had previously failed to file tax returns on time. The evidence consisted of extracts of Internal Revenue Service records and the testimony of an Internal Revenue Service employee explaining the record extracts. The evidence disclosed that petitioner did not file returns for 1960 and 1961, filed late returns for 1963-1965 and 1967-1969, and filed timely returns for 1962, 1966, and 1970 (Tr. 60-66). In denying petitioner's motion to exclude this evidence, the trial court found the evidence relevant to the issue of intent. In its charge to the jury, the trial court instructed that the evidence of delinquencies in filing returns for prior years could be considered only on the question of criminal intent (Tr. 251-252).

The court of appeals affirmed *per curiam* (Pet. App. A-1 to A-2). It held that the evidence of petitioner's failure to file timely returns in the past was relevant to the issue of intent and therefore admissible under Fed. R. Evid. 404(b). The court concluded that the evidence was not remote because it covered the 11 consecutive years prior to the prosecution years and that the probative value of the evidence outweighed any prejudice to petitioner. After examining the government's file, the court rejected petitioner's claim of selective prosecution (Pet. App. A-2).

ARGUMENT

1. The court of appeals correctly upheld the district court's admission of the evidence of petitioner's failure to file timely tax returns during the 11-year period prior to

the prosecution years. Traditionally, evidence of other crimes has been admissible to establish intent, motive, guilty knowledge, absence of accident or mistake, and the identity of the perpetrator, if such matters are in issue. See, *e.g.*, *United States* v. *McMillian*, 535 F. 2d 1035, 1038 (8th Cir. 1976), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Calvert*, 523 F. 2d 895, 906 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976). This common law rule is now incorporated in Fed. R. Evid. 404(b) and 403.[1]

Petitioner contends (Pet. 6-7) that the decision below conflicts with *United States* v. *Myers*, 550 F. 2d 1036, 1044 (5th Cir. 1977), and *United States* v. *Rice*, 550 F. 2d 1364, 1372 (5th Cir.), cert. denied, 434 U.S. 954 (1977). In petitioner's view, the court below has not followed the Fifth Circuit's requirement that evidence of other crimes must be clear and convincing.

There is no conflict. By using the word "may," Rules 403 and 404(b) both accord the trial judge discretion in the admission of evidence of other crimes, where the evidence might be relevant on the issue of intent. Both rules make clear that the controlling standard is whether the evidence is relevant as to intent and whether it has

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[1]Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

probative force that outweighs any prejudicial effect.[2] See *United States* v. *Weaver*, 565 F. 2d 129, 134 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Maestas*, 554 F. 2d 834, 836 (8th Cir.), cert. denied, 431 U.S. 972 (1977). While the court of appeals did not expressly apply a "clear and convincing" standard, it has previously held that evidence of other crimes does not have probative force in excess of its prejudicial effect, if it is not clear and convincing. See *United States* v. *Jones*, 570 F. 2d 765, 768-769 (8th Cir. 1978). In other words, the "clear and convincing" requirement is implicit in the probative force requirement. Thus, even though the Eighth Circuit may no longer use the words "clear and convincing" in every case, its decisions show a uniform application of the common law standards inherent in Rules 403 and 404(b). *United States* v. *Jones, supra*, 570 F. 2d at 769; *United States* v. *Jardan*, 552 F. 2d 216, 218-219 (8th Cir.), cert. denied, 433 U.S. 912 (1977); *United States* v. *Weaver, supra*, 565 F. 2d at 134; *United States* v. *McMillian, supra*, 535 F. 2d at 1038; *United States* v. *Bledsoe*, 531 F. 2d 888, 891 (8th Cir. 1976). Indeed, on at least one occasion since the adoption of the Federal Rules of Evidence, the Eighth Circuit has reversed a conviction because it found the evidence of prior crimes "vague and speculative," rather than "clear and convincing." *United States* v. *Jones, supra*, 570 F. 2d at 768-769.

Here, on the other hand, the court specifically determined that the evidence was adequate to establish the other acts and that the evidence met the traditional

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[2]The determination whether the probative force of the evidence exceeds its prejudicial effect requires a balancing process that involves an exercise of discretion by the trial judge, which is reviewable only for abuse. *United States* v. *McMillian, supra*, 535 F. 2d at 1038; *United States* v. *Cochran*, 499 F. 2d 380, 387-388 (5th Cir. 1974), cert. denied, 419 U.S. 1124 (1975). Petitioner has not demonstrated any abuse of discretion by the trial court.

standard of admissibility (Pet. App. A-2). An element of the offense of willful failure to file timely income tax returns is willfulness. Since petitioner did not contest his failure to file returns on time for the years in question, the only issue in dispute was willfulness. It is well established that evidence of failure to file returns for years prior to the prosecution period is relevant to the issue of willfulness. See, *e.g.*, *United States* v. *Snow*, 529 F. 2d 224, 225-226 (9th Cir.), cert. denied, 429 U.S. 821 (1976); *United States* v. *Farris*, 517 F. 2d 226, 229 (7th Cir. 1975), cert. denied, 423 U.S. 892 (1975); *United States* v. *Thompson*, 513 F. 2d 577, 579 (8th Cir. 1975); *United States* v. *Johnson*, 386 F. 2d 630 (3d Cir. 1967). The pattern of petitioner's repeated noncompliance with the requirement of filing timely returns for the preceding 11 years was relevant to show that his failures in all years were deliberate, intentional, and willful. See *United States* v. *Farris, supra*, 517 F. 2d at 229; *United States* v. *Cochran, supra*, 499 F. 2d at 387-388; *United States* v. *Johnson, supra*, 386 F. 2d at 631.

Moreover, the evidence of a pattern of deliberate recurring noncompliance with the return-filing requirement had probative value that greatly outweighed its prejudicial impact. Indeed, any prejudice to petitioner was eliminated by the trial judge's specific limiting instruction that the evidence of his prior acts could be considered only with respect to the question of intent. See, *e.g.*, *United States* v. *Carrillo*, 561 F. 2d 1125, 1127 (5th Cir. 1977); *United States* v. *Calvert, supra*, 523 F. 2d at 907.

2. Petitioner further contends (Pet. 11) that an alleged four-year delay before indictment violated his right to due process. As this Court held in *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977), the threshold question in assessing a claim of preindictment delay is whether the

defendant suffered actual prejudice. If the delay in fact resulted in prejudice, the court must then examine the reason for the delay to determine whether it was impermissible under the circumstances. *Id.* at 788-796. See also *United States* v. *Gray*, 565 F. 2d 881, 892 (5th Cir. 1978); *United States* v. *Lane*, 561 F. 2d 1075, 1077 (2d Cir. 1977); *United States* v. *Partyka*, 561 F. 2d 118, 122 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978); *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977).

Petitioner does not show how the lapse of time before indictment prejudiced his ability to defend himself. Moreover, there is nothing in the record that would support the inference that the lapse of time was the product of a conscious decision to give the government a tactical advantage, or even of reckless or negligent disregard for petitioner's ability to defend himself. To the contrary, the delay in this case resulted from careful consideration of the question whether to prosecute.

3. Petitioner also argues (Pet. 10-11) that the selection of his case for prosecution was prompted by improper motivations. The courts of appeals are in agreement that the selection of certain tax offenders for prosecution is proper unless (1) others who are similarly situated are consistently not prosecuted, or (2) any selection is based on improper criteria, such as racial or religious discrimination. See *United States* v. *Murdock*, 548 F. 2d 599, 600 (5th Cir. 1977); *United States* v. *Oaks*, 527 F. 2d 937, 940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976); *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (8th Cir. 1975). There is no evidence that there was any impropriety in the selection of this case for prosecution.

Petitioner asserts (Pet. 10) that the agent's referral of his case to the Intelligence Division of the Internal Revenue Service was improperly influenced by petitioner's

refusals to comply with the agent's demands for payment of unrelated tax liabilities. But the agent testified that petitioner's failures to pay the unrelated tax liabilities did not prompt his referral of the case to the Intelligence Division. Moreover, petitioner does not allege that the person with the actual responsibility for deciding whether to prosecute, *i.e.*, the Acting Assistant Attorney General of the Tax Division, or anyone else in the decision-making process, was improperly motivated in deciding to initiate the prosecution. The final decision to prosecute was made approximately three years after petitioner's failures to comply with the purported demands for payment of the unrelated tax liabilities. It is therefore hardly likely that petitioner's failure to pay the unrelated tax contributed to the decision to prosecute. Indeed, it is much more likely that petitioner's history of persistent noncompliance with the requirement of filing timely returns was the decisive factor in selecting his case for prosecution. Surely there is nothing improper in selecting the most flagrant lawbreakers for prosecution of tax crimes. Cf. *United States* v. *Gardiner*, 531 F. 2d 953, 954 (9th Cir.), cert. denied, 429 U.S. 853 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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